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Arnold Industries, Inc. v. William S. Love : William S. Love and Irene C. Love v. Arnold Industries, Inc. : Brief of Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

ARNOLD INDUSTRIES, INC.,

Plaintiff and Appellant,

vs.

WILLIAM S. LOVE, et al,

Defendants and Appellees.

Case No. 20010266—SC

Priority No. 15

WILLIAM S. LOVE & IRENE C. LOVE,

Counterclaimants and Third-Party Plaintiffs

vs.

ARNOLD INDUSTRIES, INC., et al,

Counterclaim and Third-Party Defendants.

APPEAL FROM THE ORDER AND FINAL JUDGMENT OF THE THIRD DISTRICT COURT FOR SALT LAKE COUNTY, UTAH
DATED JULY 25, 2000 and JANUARY 30, 2001
THE HONORABLE STEVEN L. HENRIOD

BRIEF OF APPELLANT, ARNOLD INDUSTRIES, INC.

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LIST OF PARTIES TO THE PROCEEDING

Plaintiff, Appellant:	ARNOLD INDUSTRIES, INC. a Utah Corporation
Defendants, Appellees:	WILLIAM S. LOVE, IRENE C. LOVE, individuals, CONMART, INC., a Utah corporation, SALT LAKE COUNTY, a political subdivision of the State of Utah, and KATIE L. DIXON, individually and in her capacity as former Salt Lake County Recorder.
Counterclaimants, Third Party Plaintiffs:	WILLIAM S. LOVE and IRENE C. LOVE, individuals.
Counterclaim and Third Party Defendants:	ARNOLD INDUSTRIES, INC., a Utah corporation; UNITED STATES OF AMERICA GENERAL SERVICES ADMINISTRATION; WILLIAM J. LOWENBERG, WESTERN MANAGEMENT, a partnership; SMITH, HALANDER & SMITH; a partnership, MINSON-HALANDER, INC., a Utah corporation; H.FRED SMITH; ROLAND W. SMITH; DALE N. MINSON; ROBERT S. HALANDER; MASSACHUSSETTS MUTUAL LIFE INSURANCE COMPANY, a Massachusetts company; MARILYN M. HENRIKSEN, solely and in her capacity as trustee.

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STATEMENT OF JURISDICTION

Jurisdiction of this appeal properly lies with the Utah Supreme Court pursuant to Utah Code Ann. section 78-2-2(3)(j) (1953, as amended).

STATEMENT OF ISSUES PRESENTED

This appeal presents four broad areas of inquiry and numerous underlying issues. The first area of inquiry is whether the various deeds in question are effective to create the easement claimed by Appellees, William S. and Irene C. Loves (hereinafter the "Loves"). The second is, even assuming that the deeds in question were effective, whether Appellant, Arnold Industries, Inc. (hereinafter "Arnold"), is bound by the Loves' claim. The third is whether Arnold has a viable claim against the Salt Lake County Recorder (hereinafter the "County" or the "Recorder"). The fourth is whether the trial court erred in denying Arnold's motion to strike or, in the alternative, to compel discovery. The specific issues are:

1. Does Utah's After-Acquired Title Statute (Utah Code Ann. § 57-1-10) apply to easements when that statute, in its express language, applies only to estates and not to servitudes such as easements? This issue is reviewed for correctness, Durham v. Duchesne County, 893 P.2d 581 (Utah 1995), and was preserved for appeal at R.550, 672.

2. Whether Utah recognizes the equitable doctrine of estoppel by deed, and if so, what are the true origins and nature of the doctrine? This is a question of law which is reviewed for correctness, Jackson v. Righter, 891 P.2d 1387 (Utah 1995), and was preserved at R.551, 674.

3. Does the equitable doctrine of estoppel by deed operate "automatically" to pass after-acquired title "by operation of law," or does it operate in equity by way of an estoppel? The interpretation and the correct application of a legal doctrine are questions of law which are reviewed under a correctness standard, Sandy City v. Salt Lake County, 827 P.2d 212 (Utah 1992), and was preserved at R.551, 676.

4. Whether, in applying the equitable doctrine of estoppel by deed, a court must find "reasonable reliance" as required in other instances of estoppel? The interpretation and the correct application of a legal doctrine are questions of law which are reviewed under a correctness standard, Sandy City v. Salt Lake County, 827 P.2d 212 (Utah 1992), and was preserved at R.551, 676.

5. Whether Utah recognizes the equitable doctrine of counter estoppel? The Court's recognition of a certain claim or cause of action is a question of law. See Jackson v. Righter, 891 P.2d 1387 (Utah 1995). This issue was preserved at R.555, 679.

6. Whether, under this Court's interpretation of Utah's Uniform Partnership Act (Utah Code Ann. § 48-1-1 et seq.) with regard to ownership of real property, a partnership as an entity owns its real property and the partners do not? This is a question of law which is reviewed for correctness. Durham v. Duchesne County, 893 P.2d 581 (Utah 1995). This issue was preserved at R.548, 550, 972-77.

7. Whether the Loves are bound by the public record, which indicates that the Arnold property was owned by the individuals and that the Corrective Warranty Deed was executed by the partnership? The trial court's application of legal principles to factual findings is reviewed for correctness. State v. Perry, 899 P.2d 1232 (Utah Ct. App. 1995). The issue was preserved at R.554, 678-79.

8. Whether a corrective (confirmation) deed can "create" an easement when the deed lacks words of conveyance and when the original deed from which it arises is void for want of a grantor? Interpretation of an unambiguous deed is a question of law, which is reviewed

on appeal for correctness. Johnson v. Higley, 989 P.2d 61 (Utah Ct. App. 1999). This issue was preserved at R.548, 550, 978-80.

9. Whether the failure to abstract a document to the tract index as required by Utah Code Annotated section 17-21-6(6) (1998) compels a determination that a subsequent purchaser was not on notice of the document pursuant to Utah's race-notice recording statute, Utah Code Annotated section 57-3-2 (1994)? Conflicts between statutes require a legal determination, which is reviewed for correctness. Div. of Unclaimed Prop. v. McKay Dee Credit Union, 958 P.2d 234 (Utah 1998). The issue was preserved at R.548-49, 980-82.

10. Is the abstract of the 1991 Corrective Warranty Deed sufficient to impart notice of Loves' claim of easement when it states, "ALSO POSTED SEC 22 1S 1W SEE DOCUMENT FOR ADDITIONAL DESCRIPTION," but does not describe the Arnold property? The trial court's application of legal principles to factual findings is reviewed for correctness. State v. Perry, 899 P.2d 1232 (Utah Ct. App. 1995). The issue was preserved at R.980-82.

11. Can the Quiet Title Decree which pertains solely to setback requirements of the restrictive covenants establish the easement? A trial court's interpretation of an unambiguous decree is reviewed for correctness. Southwick v. Leone, 860 P.2d 973 (Utah Ct. App. 1993). The issue was preserved at R.983.

12. Did the trial court err in denying Arnold's motion to strike after Third Party Defendants refused to respond to discovery requests? A trial court's ruling on a motion to strike is reviewed under an abuse of discretion standard. Rivera ex rel. Rivera v. State Farm

Mut. Auto Ins. Co., 1 P.3d 539 (Utah 2000) (citing Dove v. Cude, 710 P.2d 170, 171 (Utah 1985)). The issue was preserved at R.1279-84, 1360-66.

13. Was Arnold's notice of claim to Salt Lake County timely? The issue of when a claimant discovered, or should have discovered, the facts forming the basis of a cause of action is a question of fact and is reviewed on a "clearly erroneous" standard. Sevy v. Sec. Title Co. of S. Utah, 902 P.2d 629 (Utah 1995). Whether the discovery rule applies to toll the statute of limitations is a question of law reviewed for correctness. Hom v. Utah Dep't of Pub. Safety, 962 P.2d 95 (Utah Ct. App. 1998). The issue was preserved at R.1069-1103.

STATUTES OF CENTRAL IMPORTANCE TO THIS APPEAL

The text of the following provisions is set forth at Addendum Exhibit 4.

Utah Code Ann. § 17-21-3 (1998)	(Recorder's Statute - 1998)
Utah Code Ann. § 17-21-3 (1999)	(Recorder's Statute – 1999)
Utah Code Ann. § 17-21-6(6) (1998)	(Recorder's Statute – duties)
Utah Code Ann. § 48-1-1 (1998)	(Utah Uniform Partnership Act)
Utah Code Ann. § 57-1-10 (1994)	(Utah's After Acquired Title Statute)
Utah Code Ann. § 57-3-2 (1994)	(Race Notice Statute - 1994)
Utah Code Ann. § 57-3-102 (1998)	(Race Notice Statute – 1998)

STATEMENT OF THE CASE

This action was commenced to quiet title to property owned by Arnold as against the claim of an easement by Loves. R.1-9. The property owned by Arnold (hereinafter sometimes the "Arnold property") and the property owned by the Loves (hereinafter sometimes the "Love property") are immediately adjacent to one another. The Arnold

property is west of the Love property. R.525. Arnold's property is located entirely in Section 21, Township 1 South, Range 1 West, Salt Lake Base and Meridian. Loves' property is located in both Sections 21 and 22. Add. Ex. 1, item 2; R.527.

Loves' assertion of an easement is founded upon three deeds executed between 1982 and 1991. Two of these deeds are in the chain of title to the Loves' property and purport to grant an easement over the Arnold property in conjunction with a sale of the *Loves'* property. The third deed, in the Arnold chain of title, is the basis for the Loves' claim of estoppel by deed. A fourth and separate deed, also in the Arnold chain of title, forms the basis for Arnold's defense of counter estoppel. All of these deeds were recorded in the official records of the Salt Lake County Recorder's Office.

The complaint was filed on October 4, 1996. R.1. Arnold sought a determination that the deeds were not legally effective to create the easement claimed by the Loves. R.1-9. On August 21, 1998, the complaint was amended to name the County as a defendant. R.780. Arnold sought damages against the County due to the Recorder's failure to properly abstract a 1991 corrective warranty deed to the tract index for the Arnold property. R.789-91.

The issues concerning the legal effectiveness of Loves' claim of an easement were presented to the trial court by way of cross motions for summary judgment. R.357-77, 531-63, 587-611, 661-84. Oral arguments on the motions were heard on March 1, 1999. Ruling from the bench, the trial court denied Arnold's motion and granted Loves' motion for summary judgment. R.934, 1433 (pp. 70-71). A proposed order was submitted by Loves pursuant to the court's ruling. R.991. Arnold filed an objection to the proposed order.

R.970. The order was entered over Arnold's objection, and thereafter Loves filed a supplemental affidavit. R.1001. Based upon the sworn testimony in the affidavit, Arnold requested discovery that was refused. R1040. Arnold then moved to strike the supplemental affidavit. R.1275.

Prior to the ruling on the cross-motions for summary judgment, Salt Lake County had filed a motion to dismiss in response to Arnold's amended complaint. R.935. Oral arguments on this motion were heard on June 30, 2000. The court entered an order granting the County's motion to dismiss on July 25, 2000. R.1312.

On November 21, 2000, the court denied a motion by Arnold to strike the supplemental affidavit filed by the Loves. R.1368. Ultimately, a final judgment implementing the ruling on the cross-motions for summary judgment was entered on January 30, 2001. R.1398. A notice of appeal was filed on February 27, 2001. R.1415.

Statement Of Facts

Introduction. The facts involved in this appeal arise from events and recorded deeds that span almost a quarter of a century. The earliest pertinent deed was recorded in 1975. The last relevant out-of-court event occurred in August of 1997. A statement of the essential facts follows. A more detailed treatment of the facts is included within the arguments, which are organized chronologically. Also, Addendum, Exhibit 7 is a diagram of the chains of title to both properties, identifying the deeds and conveyances in question. R.987. On Exhibit 7, the deeds are referenced by capital letters in quotes and will be so referenced herein. Copies of the deeds themselves are similarly designated in the Addendum, Exhibit. 2, "A"-"W".

For most of the twenty-two years pertinent to this case, title to both properties was held in the names of certain individuals and entities. With minor exception, the individuals and the principals of the entities, were always some combination of four individuals: Ronald W. Smith, Dale N. Minson, Robert S. Halander, and H. Fred Smith (hereinafter sometimes "the individuals" or "Smith, Halander, Smith, and Minson individually"). Add. Ex. 7, R.987. Originally, both the Love property and the Arnold property were owned by the same entity, Plan-Tech Corp., a Utah corporation. H. Fred Smith was the president and Robert S. Halander was the secretary of Plan-Tech Corp. Plan-Tech Corp. divided the properties into the Arnold and Love properties in 1975. R.270. After the properties were divided, the chain of title to the Arnold property became complex, with approximately a dozen conveyances between 1975 and 1991. Add. Ex. 7, R.987. The chain of title to the Loves' property is less involved, with only four conveyances during the same time period. Id.

The 1982 Warranty Deed. The first unsuccessful effort to create an easement over the Arnold property occurred in a 1982 warranty deed ("D") in the chain of title to the *Loves'* property. R.275. This deed (hereinafter the "Warranty Deed" or the "1982 Warranty Deed") was apparently intended to create an easement over the Arnold property as part of a sale of the *Love property* from a Utah partnership known as Western Management to Loves' immediate predecessor-in-title, William S. Lowenberg (hereinafter "Lowenberg"). The partners of Western Management were Ronald W. Smith, Dale N. Minson, Robert S. Halander, and H. Fred Smith. At the time of the 1982 Warranty Deed, Western Management owned no interest in the Arnold property. This is the case for three reasons: 1)

Western Management had received no easement from its grantor, Minson-Halander ("B" and "C"; R.271, 273) because Minson-Halander received no easement from its grantor, Plan-Tech Corp. ("A"; R.270); 2) Western Management had previously quitclaimed any interest in the Arnold property ("L"; R.299); and 3) the legal description of the purported grant of easement failed to describe any part of the Arnold property. "D"; R.275.

Estoppel by Deed and Counter Estoppel. Subsequently, Western Management came into ownership of the Arnold property in October of 1982. "N"; R.301. This deed is the basis for one of Loves' theories, estoppel by deed. However, two years later in 1984, Western Management conveyed the Arnold property to Arnold's predecessor-in-title. "O"; R.302. In this deed, Western Management warranted that no easement existed across the Arnold property. This deed is the basis for Arnold's theory of counter estoppel.

Conveyance of the Arnold Property to the Individuals. Two critical conveyances in the Arnold chain of title occurred three years later in the winter and spring of 1987. In February of 1987, Smith, Halander, Smith and Associates, a Utah general partnership, executed a quitclaim deed as to its undivided one-half interest in the Arnold property. "R"; R.309. In April 1987, Walker, McElliot, Wilkinson and Associates, a Missouri general partnership, executed a special warranty deed as to its one-half interest in the Arnold property. "S"; R.311. The grantees in both of these deeds were Smith, Halander, Smith and Minson, *individually.* As a consequence, these individuals held record title to the Arnold Property at a critical time for this appeal, January 22, 1991. Exhibit 7; R.987.

The 1991 Corrective Warranty Deed. On January 22, 1991, a corrective warranty deed ("E") (hereinafter the "1991 Corrective Warranty Deed" or the "Corrective Warranty

Deed") was executed. R.277. As noted, at that time record title to the Arnold property was in the names of: H. Fred Smith, Robert S. Halander, Ronald W. Smith, and Dale N. Minson, individually. "R" and "S"; R.309, 311. Central to this appeal, these same four individuals executed the Corrective Warranty Deed on behalf of Western Management as "General Partner." "E"; R.277. Hence, these persons, in their capacities as "General Partner[s]" of Western Management, purported to create an easement over the Arnold property, in which record title was held in their individual names.

Abstracting Errors. The next significant events concern the Salt Lake County Recorder's failure to properly abstract the 1991 Corrective Warranty Deed. It is undisputed that the legal description in the Corrective Warranty Deed described the Arnold property. "E"; R.277. However, critically, it is also undisputed that the legal description of this purported grant of easement was not abstracted by the Salt Lake County Recorder's Office to the tract index for the Arnold property as required by Utah Code Annotated section 17-21-6(6) (1998). R.637. Also critically, the Recorder listed William J. Lowenberg as both grantor and grantee in the grantors' and grantees' indices. Utah Code Ann. §§ 17-21-6(2), (3) (1998); R.637, 639, 644. Yet, Lowenberg never owned an interest in the Arnold property. Ex. 7; R.275, 987.

The Quiet Title Decree. In February 1991, a "Declaratory/Quiet Title Decree" was recorded in the office of the Salt Lake County Recorder. R.629. This Decree, which was abstracted to the Arnold property, pertained solely to set back requirements in the conditions, covenants, and restrictions that governed the Love property. The operative

(decretal) language of the Decree is silent as to, and does not establish the existence of, any easement or right-of-way encumbering the Arnold property. R.629.

Status of Record Title as of the Date of Arnold's Purchase. Accordingly, in 1993, the condition of record title, deeds, and the official indices in the Salt Lake County Recorder's Office was as follows: The 1982 Warranty Deed had failed to create the easement over the Arnold property. "D"; R.396, 525. In October 1982, Western Management, the grantor of the 1982 Warranty Deed, came into ownership of the Arnold property. "N"; R.301. In May 1984, Western Management conveyed the Arnold property to Arnold's predecessor-in-title and warranted title to be free of encumbrances. "O"; R.302. The 1991 Corrective Warranty Deed described the Arnold property but was not abstracted to the tract index for the Arnold property. "E"; R.277. Nor was the Corrective Warranty Deed indexed to the grantees' or the grantors' indices so as to give notice that the Corrective Warranty Deed purported to affect the Arnold property. R.637. This is because Lowenberg was indexed as both grantee and grantor. R.637, 644. Finally, although the 1991 Quiet Title Decree was abstracted to the Arnold property, R.638, that Decree pertained only to set back requirements and had no bearing upon whether an easement was created in the prior deeds. R.629-31.

Purchase of the Arnold Property. Arnold purchased the property from Conmart, Inc., a Utah corporation, and Dale N. Minson, individually, on July 15, 1993. R.315, 1072. H. Fred Smith was the president of Conmart, Inc. "U"; R.315. Prior to purchasing the Arnold property, Arnold commissioned a search of the title records of the Salt Lake County Recorder's Office. R.1073. Due to the County's failure to properly abstract the Corrective

Warranty Deed, not only was the deed not discovered in Arnold's title search, but due to its very nature, the County's omission was also unknown to Arnold. R.1073.

Love's Claim of Easement and Notice to the County. In April 1996, approximately three years after Arnold purchased the property and approximately five years after the County failed to properly abstract the Corrective Warranty Deed, Loves made their first claim to an easement over the Arnold property. R.1073. From April 1996 until July 1997, settlement negotiations took place between Loves' counsel and Arnold's counsel. R.1073, 1199-1246. Ultimately, the settlement negotiations broke down, and litigation commenced in earnest in July 1997. R.1077. At this time, a detailed examination of the unofficial computerized records of the Recorder revealed, for the first time, that the County had failed to properly abstract the Corrective Warranty Deed to the tract index for the Arnold property, as well as to the grantees' and grantors' indices. R.1077. In August 1997, Arnold gave notice of its claim against Salt Lake County. R.1079-80.

Arnold's Motion to Strike. After the court ruled on the cross motions for summary judgment on March 1, 1999, R.934, 1433 (pp. 70-71), Arnold filed an objection to the ruling. R.970. In addition to stating the legal grounds as to why the court's ruling was in error, Arnold also noted that the ruling was based *entirely* upon deeds of record and that Loves had offered no evidence or affidavit to prove that, at the time of the 1991 Corrective Warranty Deed, the Arnold property was anything other than individual property. R.976. The trial court entered an order prepared by Loves' counsel without comment as to Arnold's objection. R.991.

After the order was entered, Loves submitted the Supplemental Affidavit of Ronald W. Smith. R.1001. In the affidavit, Mr. Smith, for the first time, testified that even though the Arnold property was held in the names of the individuals, it was really partnership property. R.1002-1003. Appellant then served discovery upon Ronald W. Smith and the other Third Party Defendants, seeking tax records which would evidence whether the Third Party Defendants had treated the Arnold property as partnership property for tax purposes. R.1038, 1296-1311. Mr. Smith and the other Third Party Defendants refused to provide any meaningful information. R.1296-1311. What little information was provided supported a conclusion that the Arnold property had been treated as individual property. R.1371-72 ¶¶ 6, 8. Appellant then filed a motion to strike the affidavit or, in the alternative, to compel the requested discovery. R.1275. The court denied this motion on November 21, 2000. R.1368. The court denied a motion to reconsider on January 5, 2001. R.1389. The final judgment in this action was then entered on January 30, 2001. R.1398.

SUMMARY OF ARGUMENTS

Arnold asserts that Loves have no easement under either Utah's After-Acquired Title Statute or the doctrine of estoppel by deed. The 1982 Warranty Deed and the 1991 Corrective Warranty Deed failed to create an easement due to defects in those deeds. In addition, both are void for want of grantors. Loves' claim of estoppel is not supported by reasonable reliance and is barred by a counter estoppel. Moreover, Arnold is entitled to rely on, and the Loves are bound by, the public record. Constructive notice is imparted when a document is properly recorded. This is the case under the applicable statutes and recent amendments to the recorder's and race-notice recording statutes. The Recorder failed to

properly index and abstract the Corrective Warranty Deed. Finally, the trial court erred in dismissing Arnold's claim against the County. For purposes of the Governmental Immunity Statute, Arnold gave timely notice to the County under the facts of this case.

ARGUMENT

The beginning point in this matter is the 1982 Warranty Deed. "D"; R.275. It is uncontested as a matter of law that no easement was established when Western Management attempted to create an easement through this deed. R.368 ¶ 8, 372-75, 605, 1433 (pp. 14-15). This was because: 1) Western Management could not have received an easement from its grantor, Minson-Halander, in 1979 ("B" and "C") because Minson-Halander had not received an easement from its grantor ("A"); 2) Western Management had previously quitclaimed any interest it might have had in the Arnold property in 1981 ("L"); and 3) the legal description in the 1982 Warranty Deed failed to describe any part of the Arnold property. The first item in Exhibit 1 (R.525) is a diagram of the legal description of the easement described in this deed. The Arnold property is identified in yellow. The description of the purported easement is in green. As can be seen from the exhibit, the description fails to include any portion of the Arnold property. Accordingly, the Warranty Deed failed to create the easement in question. R.372.

I. UTAH'S AFTER-ACQUIRED TITLE STATUTE DOES NOT APPLY TO SERVITUDES AND THEREFORE COULD NOT CREATE AN EASEMENT OVER THE ARNOLD PROPERTY.

After Western Management inaccurately represented to Lowenberg in the 1982 Warranty Deed ("D"; R.275) that an easement in favor of Lowenberg existed across the

Arnold property, Western Management came into title of the Arnold property. This occurred later in October 1982. "N"; R.301.

In granting summary judgment to Loves, the trial court ruled that Loves received an easement by virtue of either Utah's After-Acquired Title Statute or the doctrine of estoppel by deed. R.994. However, Utah's After-Acquired Title Statute (hereafter, "the Statute") only applies to purported conveyances of estates, and particularly, conveyances in "fee simple absolute." The terms of the Statute are clear and unambiguous:

> If any person shall hereafter convey any ***real estate*** by conveyance purporting to convey the same ***in fee simple absolute***, and shall not at the time of such conveyance have the legal ***estate*** in such real estate, but shall afterwards acquire the same, the legal ***estate*** subsequently acquired shall immediately pass to the grantee, his heirs, successors or assigns, and such conveyance shall be as valid as if such legal ***estate*** had been in the grantor at the time of the conveyance.

Utah Code Ann. § 57-1-10 (1994) (emphasis added) (full text, Add. Ex. 4). It is hornbook law that an easement is an encumbrance or servitude, not an estate: "An easement is neither an estate in land nor the land itself. It is, however, property or an interest in land." 25 Am. Jur. 2d Easements and Licenses §2 (1996).

> While it is always distinct from the occupation and enjoyment of the land itself, and is not an estate in land, or confer title to the land, or constitute a lien thereon, an easement is property, and partakes of the nature of land.

28A C.J.S. Easements §5 (1996). Utah recognizes this axiom. Hayes v. Gibbs, 169 P.2d 781 (Utah 1946) ("[A]n easement is not a lien, it is rather a servitude imposed upon the land sometimes said to be 'carved out' of the servient estate.").

Case law from other jurisdictions supports the view that the Statute only applies to estates. In Noronha v. Stewart, 245 Cal. Rptr. 94 (Ct. App. 1988), the California appellate

court reviewed that state's after-acquired title statute (which is essentially similar to Utah's) to determine whether it applied to the claim of an easement for an encroaching wall. The court concluded that the after-acquired title statute was not applicable, stating: "This statutory rule is limited to grants of fee simple and is therefore not applicable to the case at hand." Id. at 96 (full text, Add. Ex. 3). The Noronha court continued in its analysis, indicating that while the doctrine of after-acquired title would not apply to an easement, the doctrine of estoppel by deed could be applied in that case. Id.

"[W]here the statutory language is plain and unambiguous, we do not look beyond the language's plain meaning to divine legislative intent." Horton v. Royal Order of the Sun, 821 P.2d 1167, 1168 (Utah 1991). Because the clear and unambiguous language of the statute does not contemplate interests other than estates in land, it does not apply to servitudes such as easements. Thus, if Loves could claim an easement, it could only arise under the doctrine of estoppel by deed. However, as shown below, that doctrine does not avail Loves' claim.

II. THIS COURT SHOULD CLARIFY WHETHER THE EQUITABLE DOCTRINE OF ESTOPPEL BY DEED APPLIES TO EASEMENTS.

Because the After-Acquired Title Statute is limited to estates, the Court must address whether an easement was created under the doctrine of estoppel by deed. The doctrine of estoppel by deed has been referenced by that name in only three Utah cases: Hall v. Fitzgerald, 671 P.2d 224 (Utah 1983), Dowse v. Kammerman, 246 P.2d 881 (Utah 1952), and Allen v. Fitzgerald, 65 P. 592 (Utah 1901). From these references, it would appear that

the doctrine of estoppel by deed is recognized as the law of Utah. It is certainly recognized in other jurisdictions.

> The doctrine of estoppel by deed . . . is of such universal recognition that citation of precedents would serve no useful purpose. . . . "In this country a party is estopped not only from denying his deed, but every fact which it recites . . . ." Such recitals constitute primary proof which cannot be averred against.

Woldert v. Skelly Oil Co., 202 S.W.2d 706, 709 (Tex. Civ. App. 1947) (citations omitted).

However, there is some question as to whether this doctrine applies to easements or other servitudes. For instance, Dowse states:

> There is no diversity of opinion to the rule that estoppel by deed operates ***only*** where the conveyance is intended to convey a particular ***estate***, which the grantor subsequently acquires.

246 P.2d at 882 (emphasis added). Similar language can be drawn from other jurisdictions. See Callahan v. Stewart, 231 F. Supp. 115 (E.D. Okla. 1964) (estoppel works upon the specific estate). California, on the other hand, has held the doctrine applicable to easements. See Noronha v. Stewart, 245 Cal. Rptr. 94 (Ct. App. 1988) (after-acquired title statute does not apply to easements but estoppel by deed does) (full text, Add. Ex. 3).

If, like the After-Acquired Title Statute, the doctrine of estoppel by deed is applicable only to estates in land and not to servitudes, then Loves could not have acquired an easement over the Arnold property under this theory. Alternatively, if the Court holds that the doctrine is applicable to easements, Loves' claim of easement is still barred for other reasons addressed below. However, before addressing those reasons, the Court should clarify that estoppel by deed is purely an equitable doctrine, not one arising from the common law.

III. THE DOCTRINE OF ESTOPPEL BY DEED OPERATES IN EQUITY, NOT AT LAW, AND THUS, AN EASEMENT WAS NOT "AUTOMATICALLY" CREATED IN FAVOR OF THE LOVES WHEN WESTERN MANAGEMENT TOOK TITLE TO THE ARNOLD PROPERTY.

Loves argued, R.373-74, 375, and the trial court found, R.991-95, that an easement was created "automatically" under the common law doctrine of estoppel by deed when Western Management came into title to the Arnold property in 1982. "N"; R.301. However, the Utah cases applying the doctrine estoppel by deed, as well as other authorities, make clear the *equitable* origins of estoppel by deed. For example, the Wyoming Supreme Court, noting the fact that "the rule of estoppel is fundamentally one of equity," has declared:

> it is still an equitable doctrine, not an inflexible rule, a shield of the innocent, not a sword of destruction.

Sharples Corp. v. Sinclair Wyo. Oil Co., 168 P.2d 565, 569 (Wyo. 1946) (citations omitted). The court also stated:

> The ultimate criterion herein would seem to be the intention of the parties, which must be gathered . . . from the deed itself and the surrounding circumstances.

Id., at 568.

An early treatise on this subject probes its origins and dispels the mistaken assumption that the doctrine is derived from the common law:

> [I]n the majority of the cases decided, the courts, in endeavoring to administer substantial justice, have unconsciously been administering the doctrines of equity, although professedly basing the result upon certain supposed rules of the common law which really have no existence . . . .

William Henry Rawle, A Practical Treatise in the Law of Covenants for Title § 265, at 424 n.1 (5th ed., Boston, Little, Brown & Co. 1887). A passage by Rawle is worth quoting verbatim:

> It may well be doubted whether the elaborate learning [of the American Courts] by which the [American] doctrine [of estoppel by deed] is sought to be deduced from and connected with the [early English common] law of warranty or the modern covenants for title, under the branch of estoppel, has any application whatever to such law. Practically it has not, for it has been seen that the doctrine is applied not only where all remedies growing out of warranty or of covenant are wanting, but where, ***in the absence of covenants***, it is made to depend upon ***intention***, ***indicated by recital or otherwise***. No one can fail to perceive that with few exceptions the [American] cases which have taken up this doctrine were correctly decided upon the facts presented, and objection should lie rather to the grounds of the decisions, which are sought to be based upon common law instead of upon equitable doctrine. For the result of the cases would seem to show that instead of giving effect to a rule of the common law, they are in fact administering equity . . . .

Id. at 422-23 ("intention" emphasized in original).

Because estoppel by deed operates in equity, Loves' claim that Lowenberg "automatically" became owner of an easement over the Arnold property at the instant Western Management came into title to that property is incorrect. Similarly, the trial court improperly followed the Loves' analysis, when it held:

> [the] after-acquired title doctrine or estoppel by deed apply in this case because both Western Management and the individual partners came into title to the Arnold Property.

R.994. There is no basis or means by which the easement could have "automatically" passed, as Loves argued and the trial court held. Rather, the doctrine is equitable in nature and operates as:

> a bar which precludes a party to a deed and his privies from asserting as against the other and his privies, any right or title in derogation of the deed, or from denying the truth of any material fact asserted in [the deed].

31 C.J.S. Estoppel and Waiver § 10 (1996) (full text, Add. Ex. 3); see also Kadrmas v. Sauvageau, 188 N.W.2d 753 (N.D. 1971) (similar language). The distinction is between an estoppel analysis, which operates in equity against a common grantor, and a conveyancing analysis, under which an easement would vest automatically as a matter of law.

In support of the view that the doctrine operates in equity and therefore a court must examine the equities, the Wyoming Supreme Court stated:

> Not every conveyance involves an estoppel; a sound reason must exist to result in an estoppel as to after-acquired property. . . . After all the rule of estoppel is fundamentally one of equity. Thus it was said in Midland Realty Co. of Minnesota v. Halverson that "the doctrine of estoppel was invented and engrafted upon the law to prevent wrongs and not to promote them."

Sharples Corp. v. Sinclair Wyo. Oil Co., 168 P.2d 565, 569 (Wyo. 1946) (citation omitted). The doctrine of estoppel by deed does not operate automatically to vest an easement in Loves. Furthermore, as demonstrated below, the equities do not favor an application of the doctrine for the benefit of the Loves.

IV. LOVES CANNOT DEMONSTRATE REASONABLE RELIANCE AND THUS ARE NOT ENTITLED TO THE BENEFITS OF ESTOPPEL BY DEED.

As in other instances of estoppel, reasonable reliance is a necessary element of estoppel by deed. Am. Sec. Transfer Inc. v. Pantheon Indus., Inc., 871 F. Supp. 400 (D. Colo. 1994) (citing Shell Oil Co. v. Trailer and Truck Repair, Co., 828 F.2d 205 (3d Cir. 1987)); see also Dominex, Inc. v. Key, 456 So. 2d 1047 (Ala. 1984), Duke v. Hopper, 486 S.W.2d 744 (Tenn. Ct. App. 1972). In this case, any reliance by Loves, or their predecessor,

upon the representations in the 1982 Warranty Deed ("D") was clearly not reasonable. This is because all of the defects in the purported grant of the easement (pp. 7-8, 13 above) were a matter of public record in 1982, as well as in 1995, when Loves acquired their property. Loves and their predecessor are charged with notice of those defects. See Hayes v. Gibbs, 169 P.2d 781 (Utah 1946) (where purchaser had notice of impediments appearing in the chain of title, he is chargeable with knowledge).

It is well-settled in Utah law that one who claims the benefit of an estoppel cannot rely upon representations or acts "if he had the means by which with reasonable diligence he could ascertain the truth." Perkins v. Great-West Life Assur. Co., 814 P.2d 1125, 1130 (Utah Ct. App. 1991) (full text, Add. Ex. 3). The public record is a means by which such knowledge may be obtained. In Gilbertson v. Charlson, the North Dakota Supreme Court stated that one requirement for estoppel was that:

> the party seeking estoppel not only lack actual knowledge regarding the true state of title, but be destitute of means of acquiring such knowledge. A public record is such a means.

301 N.W.2d 144, 148 (N.D. 1981) (citations omitted). Similarly, the Arkansas Supreme Court has held that a search of the public record puts a prudent purchaser on inquiry notice of visible flaws in title and thus actual notice is chargeable to that purchaser, who cannot then claim estoppel. Vaughn v. Dossett, 243 S.W.2d 565 (Ark. 1951); see also Schmidt v. Olympia Light & Power Co., 90 P. 212 (Wash. 1907) ("A party cannot rely on so much of a public record as is favorable to his contention, and close his eyes to the remainder.").

The requirement of reasonable reliance applies equally to estoppel by deed as it does in cases of equitable estoppel. Am. Sec. Transfer Inc. v. Pantheon Indus., Inc., 871 F. Supp.

400 (D. Colo. 1994) (citing Shell Oil Co. v. Trailer and Truck Repair, Co., 828 F.2d 205 (3d Cir. 1987)). Accordingly, the Loves cannot demonstrate reasonable reliance because the public record gave notice of all defects.

In considering the equities of this case, it is worth pointing out that while the Loves were on notice of all the defects in their chain of title, Arnold had no notice of Loves' claim, as demonstrated above (pp. 7-8, 13) and below (Point XI).

V. THE DOCTRINE OF COUNTER ESTOPPEL BARS THE LOVES' CLAIM OF ESTOPPEL BY DEED.

Even if Lowenberg's or Loves' reliance had been reasonable, which it was not, the doctrine of estoppel by deed could not vest Loves with an easement because of a counter estoppel which arose from a special warranty deed executed by Western Management in 1984. Through this deed ("O"; R.302), Western Management warranted to Arnold's predecessor against all encumbrances created "by, through, or under" Western Management. Central to the issue of counter estoppel, Loves' claim of easement arises "by, through, and under" Western Management, the common grantor. R.277, 372, 598.

Utah Code Annotated section 57-1-12 states that, by its warranty, Western Management warranted and covenanted to its successors in title that no easement existed across the Arnold property. Section 57-1-12 provides that any exception to such a covenant "may be briefly inserted in such deed following the description of the land." The 1984 special warranty deed from Western Management has no exception of any sort. "O"; R.302.

By warranting to Loves' predecessor-in-title that an easement existed, and then subsequently warranting to Arnold's predecessor-in-title that no easement existed, Western Management, the common grantor, has created a counter estoppel.

> [I]f both parties claim under the same person and one is estopped by one deed and the other is estopped by another deed, both made by that person, one estoppel offsets the other, and the rights of the parties are to be adjusted without regard to any estoppel.

31 C.J.S. Estoppel and Waiver § 10 (1996) (full text, Add. Ex. 3); see also Schmidt v. Olympia Light & Power Co., 90 P. 212 (Wash. 1907) (similar language). In Florida Land Inv. Co. v. Williams, 116 So. 642 (Fla. 1928), the Florida Supreme Court held,

> [t]he rule is . . . well settled that, if the defendant offers an estoppel [in] his defense, the plaintiff may assert a counter estoppel, and proof of the counter estoppel sets the matter at large; that is to say, one estoppel neutralizes the other, leaving the matter as if neither estoppel had been offered.

See also Linville v. Nance Dev. Co., 304 P.2d 453, 459 (Kan. 1956); Hopkins v. Hopkins, 165 So. 414 (Miss. 1936).

While no Utah case discusses counter estoppel by that name, it is a wholesome doctrine, well-recognized in the law. See 28 Am. Jur. 2d Estoppel and Waiver § 132 (2000) (and footnote cases). The doctrine is regularly considered by courts in a wide range of legal applications. For example: it has been applied in the context of UCC cases on negotiable instruments, First Nat'l Bank of Conway v. Henry, No. CA 87-320, 1988 WL 30189 (Ark. Ct. App. Mar. 30, 1988), Parsons Travel, Inc. v. Hoag, 570 P.2d 445 (Wash. Ct. App. 1977); it has been applied to insurance contract claims, Farley v. Metro. Life Ins. Co., 513 N.Y.S.2d 712 (N.Y. App. Div. 1987) (court applied counter estoppel to return the parties to "status quo ante," balancing equities), Emmco Ins. Co. v. Palatine Ins. Co., 58 N.W.2d 525

(Wis. 1953) (Gehl, J., dissenting); it has also been referenced in bankruptcy, Joe Morgan, Inc. v. Amsouth Bank N.A., 985 F.2d 1554 (11th Cir. 1993). Generally, the doctrine is applied—in principle, if not in name—to cases where a party asserting estoppel should be estopped from making such a claim due to operative facts or events being within their knowledge or control. See Henderson v. First Nat'l Bank of Dewitt, 494 S.W.2d 452 (Ark. 1973), Clark v. Lesher, 290 P.2d 293 (Cal. Dist. Ct. App. 1955) ("Where an estoppel exists against an estoppel, the matter is set at large . . . as if neither estoppel had been offered . . . .").

Under the doctrine of counter estoppel, the rights of Loves and Arnold are to be adjusted without regard to Loves' claim of estoppel by deed or Arnold's counter estoppel. This leaves only the deeds, to be examined under the principles of conveyancing law. When so examined, it is clear that the 1982 Warranty Deed failed to create an easement. As will be demonstrated directly, the 1991 Corrective Warranty Deed is similarly ineffective to create an easement in favor of Loves.

VI. THE 1991 CORRECTIVE WARRANTY DEED IS VOID FOR WANT OF A GRANTOR BECAUSE UNDER THE UTAH UNIFORM PARTNERSHIP ACT, A PARTNERSHIP OWNS ITS REAL PROPERTY, THE INDIVIDUAL PARTNERS DO NOT.

The Corrective Warranty Deed ("E"; R.277), is flawed for several reasons. The most immediate flaw is that, as to the Arnold property, the deed is void for want of a grantor. This is because the deed was executed by Western Management, a partnership, at a time when four individuals held record title to the property. The trial court hurdled this issue by stating, "Title to the Arnold property was vested in the partners of Western

Management . . . ." R.994. In so holding, the trial court necessarily accepted Loves' "aggregate theory" of partnerships. Under this theory, a partnership is an aggregate of its partners and—for purposes of owning and controlling partnership property—there is no distinction between partnership and individual property. By contrast, under the entity theory, partnership property is owned by the partnership, not the partners. In accepting the aggregate theory of partnerships, the trial court assumed a position directly contrary to that of the Uniform Partnership Act as it has been interpreted by courts nation wide.

A. Under The Entity Theory Of Partnerships, Partnership Property Belongs To The Firm, Not The Partners; Therefore, The 1991 Corrective Warranty Deed Is Void For Want Of A Grantor.

The Uniform Partnership Act (Utah Code Ann., Title 48) (hereinafter "the Act") (full text, Add. Ex. 4) has been adopted by Utah and a majority of the states which have recognized that partnership property is distinct from property owned by the partners in their individual capacities. A leading commentator addressing this issue has noted:

> Functionally, despite the literal language [of the partnership act], the partnership owns its property and the partners do not. The Act would be better if it conceded this rather than accomplishing it by indirection.

Alan R. Bromberg, Crane and Bromberg on Partnership § 40(b), at 230 (1968). A California appellate court addressed this same issue. Noting the foregoing authority, that court concluded,

> a partnership [is] a "hybrid" organization that is viewed as an aggregation of individuals for some purposes, and as an entity for others. ***One of the primary areas in which a partnership is viewed as an entity is with respect to ownership of property.***

Bartlome v. State Farm Fire & Cas. Co., 256 Cal. Rptr. 719 (Cal. Ct. App. 1989) (citation omitted) (emphasis added) (full text, Add. Ex. 3).

Support for this position is found throughout the Act itself. For instance, the Act creates a new tenancy, the "tenancy in partnership." Through this new tenancy, a partner's interest in specific real property is *converted to personalty*. In re Ostler's Estate, 286 P.2d 796, 799 (Utah 1955) (full text, Add. Ex. 3). In contrast to a tenancy in partnership, persons outside a partnership take title to real property as either tenants in common or as joint tenants. Utah Code Ann. § 57-1-5 (Supp. 2000). These are conveyances of *real property* in fee simple, not personalty. Utah Code Ann. §§ 57-1-1(3), -3 (1994). This conversion to personalty is further indication that a partnership owns its property and the partners do not.

Additionally, Utah Code Annotated section 48-1-22 sets forth an individual partner's interest in partnership property. It begins by stating: "A partner is [a] co-owner with his partners of specific partnership property holding as a tenant in partnership." The statute then continues, defining "tenancy in partnership" in such a narrow and restrictive fashion that any individual partner cannot be viewed as an "owner" of partnership property in any traditional sense. That section states that a partner has no right to possess partnership property for non-partnership purposes without the consent of fellow partners; it prohibits a partner from assigning or selling his interest in specific partnership property without the consent of the partners; it prohibits execution or attachment of specific partnership property in connection with the debt of an individual partner; and it requires that the right to specific partnership property vests in surviving partners rather than the estate of a deceased partner. The statutory removal of these incidents of ownership dictates that individual partners

simply do not own property held in the name of the partnership. Conversely, and relevant to the execution of the 1991 Corrective Warranty Deed by Western Management, neither does a partnership own the separate property of its members.

A leading commentator has interpreted the Act as follows:

> [T]he partnership, rather than the partners, owns the firm property, as is apparent from the Act's recognition that all property brought into the partnership, and property acquired with partnership funds, is partnership property. . . . [P]rior law long held that the joint effects of a partnership belong to the firm, not to the partners, and that a partner has no individual property in any specific assets of the firm.

59A Am. Jur. 2d Partnership § 384 (1987) (full text, Add. Ex. 3).

Under the Act, with regard to ownership and conveyancing of property, a general partnership is an entity much like a corporation, a limited liability company, or a limited partnership. As with any of these entities, an instrument executed by an officer/agent in his/her representative capacity would not bind the individual. Because Western Management was an entity separate from the individual partners, and because the 1991 Corrective Warranty Deed was executed by the partnership, it was not effective to encumber the Arnold property which was owned by the individuals. Stated otherwise, as to the Arnold property, the 1991 Corrective Warranty Deed is void for want of a grantor. Compare Sharp v. Riekhof, 747 P.2d 1044 (Utah 1987) (deed to a "trust," which is a non-existing entity, is void for want of a grantee) (full text, Add. Ex. 3), Nilson v. Hamilton, 174 P. 624 (Utah 1918) (deed to a deceased person or his estate is void because neither is a legal entity).

B. For Purposes Of Owning And Conveying Property, The Entity Theory Of Partnerships Is The Majority Position.

The rule that a partnership is an entity is supported by long-standing cases, in Utah and elsewhere. For example, in the 1955 Utah Supreme Court case, In re Ostler's Estate, a widow sought to classify certain property held by her deceased husband's partnership as the decedent's personal property, thus making it available for distribution as part of his estate. In its analysis of the nature of partnership property, this Court considered common law precedent and the Uniform Partnership Act, as interpreted in other states. The Court concluded that the Act was intended to enforce the English rule, which held that

> where land . . . has become partnership property, it shall . . . be treated as between the partners (including the representative of a deceased partner), and also as between the heirs of a deceased partner and his executors or administrators as personal or movable, and not real or heritable, estate.

In re Ostler's Estate, 286 P.2d at 798 (Utah 1955) (quoting Partnership Act of 1890, 53 and 54 Vict. Chapt. 39) (full text, Add. Ex. 3). Thus, consistent with an entity theory of partnerships, the Court in Ostler's Estate adopted what is recognized as the majority view that an individual's usual ownership interest in real property is converted from real property to personalty when it becomes partnership property. See Ostler's Estate, 286 P.2d at 799. In its decision, this Court used reasoning similar to that of a California appellate court in Fong Sing v. O'Dell, 194 P. 745 (Cal. Dist. Ct. App. 1920), an early California case that involved distribution considerations similar to Ostler's Estate. In that case, the California court stated,

> the governing principle as to the relation of the partners to the partnership property is stated as follows: . . . ***firm property is not owned by the partners in severalty, but belongs to the partnership*** . . . .

Id. at 746-47 (emphasis added).

Numerous decisions from other courts and jurisdictions demonstrate the formation of a majority position as to the Uniform Partnership Act[1] and the specific issue of property ownership. In Roberts v. Roberts, 198 P.2d 453 (Colo. 1948), the Colorado Supreme Court considered a partner's interest in partnership property after dissolution of the partnership and stated that "personal property of a partnership is owned not by the partners individually, but by the partnership." Id. at 454. In Salomon Bros. & Hutzler v. Pedrick, 105 F. Supp. 210 (S.D.N.Y. 1952), the federal district court held that a partner *cannot* be regarded as the owner of an *undivided interest* in partnership property. Noting section 25 of the Uniform Partnership Act, the court stated that:

> It seems clear to this court that the rights of each individual partner in specific partnership assets, referred to in the statute as "tenant in partnership" falls short of what would ordinarily be regarded as individual ownership even of an undivided interest in specific assets.

Id. at 213-14. An early ruling from the Nevada Supreme Court also states the long-standing majority position as to ownership of partnership property, holding:

> It is well settled that the property of a partnership belongs to the firm and not to the partners. A partner has no individual property in any specific assets of the firm. Instead, the interest of each partner in the partnership property is his share in the surplus, after the partnership debts are paid and the partnership accounts have been settled.

State v. Elsbury, 175 P.2d 430, 433 (Nev. 1946) (citations omitted).

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[1] For example, in 1994, the Texas legislature explicitly accepted the entity theory of partnerships and rejected the aggregate theory. 48 Baylor L. Rev. 1213, 1216.

In a decision from the Fifth Circuit, the federal court was required to determine the ownership of partnership property for purposes of conflicting insurance claims. Employers Cas. Co. v. Employers Commercial Union Ins. Co., 632 F.2d 1215 (5th Cir. 1980). The Employers case arose under the law of the State of Alabama, which has adopted the Uniform Partnership Act in a form essentially identical to the act adopted in Utah. The federal court reasoned that the Act "destroy[ed] the traditional incidents of ownership" of an individual partner and concluded,

> [t]he weight of authority is that individual partners do not own partnership property. It is apparent that a partner's real interest in the partnership is not ownership of specific property but rather is his share of the profits and surplus.

Employers, 632 F.2d at 1220 (citing Salomon Bros. & Hutzler v. Pedrick, 105 F. Supp. 210 (S.D.N.Y. 1952); Wolfe v. Hewes, 254 S.E.2d 204 (N.C. Ct. App. 1979); Gaines v. Gaines, 519 S.W.2d 694 (Tex. Civ. App. 1975); 68 C.J.S. Partnership § 85; 60 Am. Jur. 2d Partnerships § 102).

Under long-settled principles of partnership law, it is clear that a partnership is an entity, separate and distinct from the partners. Such a conclusion is consistent with other decisions from Utah courts: Salt Lake Knee & Sports Rehab., Inc. v. Salt Lake City Knee & Sports Med., 909 P.2d 266 (Utah Ct. App. 1995) (like partnerships, joint ventures are distinct and separate legal entities) (full text, Add. Ex. 3), Cottonwood Mall Co. v. Sine, 767 P.2d 499 (Utah 1988) (noting several sections of the Uniform Partnership Act treating partnership as a separate legal entity) (full text, Add. Ex. 3), Wall Inv. Co. v. Garden Gate Distrib., Inc., 593 P.2d 542 (Utah 1979) (limited partnership is a distinct legal entity which can bring suit in its own name) (full text, Add. Ex. 3), Hamner v. B.K. Bloch & Co., 52 P.

770 (Utah 1898) (a judgment entered against a partnership is void as to the assets of a partner) (full text, Add. Ex. 3).

In summary, the execution of the Corrective Warranty Deed by Western Management, an entity separate and distinct from its individual partners, cannot create an easement over property owned by the individuals.

VII. THE CORRECTIVE WARRANTY DEED IS VOID FOR WANT OF A GRANTOR UNDER SETTLED PRINCIPLES OF AGENCY LAW.

Under the Act, it is also important to note that agency law governs the acts of the partners on behalf of a partnership. It is well-settled agency law that the acts of an agent on behalf of a disclosed principal are the acts of the principal, not the agent. See Utah Code Ann. § 48-1-6 (1998) (full text, Add. Ex. 4); Carlie v. Morgan, 922 P.2d 1 (Utah 1996) (as a contractual provision, implied warranty of habitability may not be enforced against agent who lawfully entered into lease on behalf of disclosed principal); 3 Am. Jur. 2d Agency § 302 (1986) ("If a contract is made with a known agent acting within the scope of his authority for a disclosed principal, the contract is that of the principal alone and the agent cannot be held liable thereon . . . .").

In this case, four partners signed the 1991 Corrective Warranty Deed as agents of Western Management. Utah Code Ann. § 48-1-6 (1998). In so doing, they could not encumber property that was owned in the agents' individual capacities. Consistently, the Utah Supreme Court has held that a partner who signs his name over a designation of authority is not personally liable on the document. Marveon Sign Co. v. Roennebeck, 694 P.2d 604 (Utah 1984). See also Wayne Smith Constr. Co. v. Wolman, 363 S.E.2d 115, 117

(S.C. Ct. App. 1987) (when a partnership enters a contract, it is with the partnership as an entity distinct from its members, not with the individual members).

Moreover, these same four individuals understood the significance of their signing capacity, having executed earlier deeds in the Arnold chain of title wherein they distinguished between acts in their individual and representative capacities. In a 1981 quitclaim deed ("L"), Ronald W. Smith, Dale N. Minson, Robert S. Halander, and H. Fred Smith each signed "individually" as well as "general partner" of Western Management. Later, in 1982, these individuals each signed a quitclaim deed ("N"), but this time, "individually" and not as partners. Thus, these individuals were not naïve, but rather were sophisticated executors when they signed the 1991 Corrective Warranty Deed. There is no ambiguity as to the capacity in which they executed the Corrective Warranty Deed.

Well-accepted principles of agency law dictate that the Corrective Warranty Deed was executed by the agents of an entity without an ownership interest, and thus, is void for want of a grantor.

VIII. THIRD PARTIES ARE ENTITLED TO RELY UPON RECORD TITLE, THUS ARNOLD TOOK WITHOUT NOTICE OF THE 1991 CORRECTIVE WARRANTY DEED.

A. While The Intention Of The Partners As To Ownership May Be Controlling As Among Partners, Third Parties Are Entitled To Rely Upon The Record Title.

The general presumption is that ownership of real estate is where the muniments of title place it. In re Perry's Estate, 192 P.2d 532, 536 (Mont. 1948); Picetti v. Orcio, 58 P.2d 1046, 1047 (Nev. 1936), aff'd 67 P.2d 315. This is particularly applicable where record title demonstrates that the signatories recognized the distinction between signing in an individual

and in a representative capacity. The holding in In re Granada, Inc., 92 B.R. 501 (Bankr. D. Utah 1988) (full text, Add. Ex. 3), a case which has striking parallels with the 1991 Corrective Warranty Deed in the present case, demonstrates how innocent third parties are entitled to rely on the record title.

In Granada, real property had been purchased by and was held in the name of Granada, Inc. prior to the organization of a limited partnership. Granada ultimately became the general partner of the limited partnership, Cinnamon Ridge, Ltd. On the date of Granada's bankruptcy petition, record title showed Granada as the fee owner. Just like Western Management in this case, Cinnamon Ridge Ltd. had no record interest. The trustee in bankruptcy filed an action to quiet title to the property and to avoid the interest of the partnership. Noting that section 544(a)(3) of the Bankruptcy Code empowers a trustee with the rights of a hypothetical bona fide purchaser of real property, the court applied Utah law and allowed the trustee to take the real property free and clear of the unrecorded interest of the partnership. In its discussion of constructive notice, the court stated:

> Record title was indisputably in the name of Granada ***in its own capacity***. Title could have been held in the name of "Granada, General Partner" or " Granada, General Partner of the Cinnamon Ridge Limited Partnership" or " Granada, in trust for the Cinnamon Ridge Limited Partnership." However, that was not done. ***Title, as it was held in this case, imparted no constructive notice of the Partnership's interest.***

92 B.R. at 504 (emphasis added). This analysis is applicable here. In this case, record title indicates that in 1991 the Arnold property was owned by H. Fred Smith, Robert S. Halander, Dale N. Minson, and Ronald Smith. "R" and "S". If Western Management had an interest in the Arnold property, record title could have easily so indicated as set forth by the

Granada court. However, as in Granada, this was not done. Accordingly, as it was held, record title imparted no constructive notice of any interest Western Management may have had in the Arnold property.

Further, the record shows that in 1987 the property was transferred from a partnership consisting largely of the same individuals (Smith, Halander, Smith and Associates) into the names of the four individuals. "R"; R.309. This fact begs the question: If the property was intended to be owned by Western Management, why did these persons as partners execute a deed to themselves individually? As noted by the South Dakota Supreme Court, "Such conduct would, of course, be illogical and unnecessary if the partnership owned the land." Reiners v. Sherard, 233 N.W.2d 579, 582 (S.D. 1975). Because record title was in the individuals, Arnold took without notice of any interest of Western Management.

B. Loves Are Bound By The Record Title.

An underlying consideration that arose within the estoppel issues, but which impacts other issues in this appeal, is the relative effect the public record should have upon the parties' positions. As noted above and below (VIII, X, and XI), Arnold was *not* on notice of the Corrective Warranty Deed. Arnold only discovered the Corrective Warranty Deed from inquiries *beyond* the public record. R.1074-76, 1077, 1190. Utah Code Ann. § 17-21-6(1)-(12) (1998) (full text, Add. Ex. 4). And, as Justice Howe has noted, "[T]here is not 'constructive notice' when an inquiry extrinsic to the public record is necessary." County Bd. of Equalization of Salt Lake County v. State Tax Comm'n of Utah, 789 P.2d 291, 296 (Utah 1990) (Howe, J., dissenting).

In contrast to the absence of notice to Arnold, the official record clearly showed the flaws in Loves' claim of easement. This includes the defects in: the 1975 deed from Plan-Tech to Minson-Halander ("A"), the 1979 deeds from Minson-Halander to Western Management ("B" and "C"), the 1982 Warranty Deed from Western Management to Lowenberg ("D"), and the 1991 Corrective Warranty Deed. "E". This record therefore binds the Loves.

> A party cannot rely on so much of a public record as is favorable to his contention, and close his eyes to the remainder.

Schmidt v. Olympia Light & Power Co., 90 P. 212, 216 (Wash. 1907); see also Hayes v. Gibbs, 169 P.2d 781 (Utah 1946) (where purchaser had notice of impediments appearing in the chain of title, he is chargeable with knowledge); Burlington N., Inc. v. L.P. Hall, 322 N.W.2d 233 (N.D. 1982) (a person on inquiry notice who does not make inquiry is deemed to have constructive notice and is not a purchaser in good faith).

In comparing the effect of record title upon the relative positions of the parties, it is apparent that Loves had the opportunity to discover the defects in their purported grant of easement and are therefore bound by the record, while Arnold took without notice of any such claim.

IX. THE 1991 CORRECTIVE WARRANTY DEED DID NOT CREATE AN EASEMENT FOR THREE FURTHER REASONS.

The Corrective Warranty Deed failed to establish an easement in 1991 because: 1) the deed lacks the necessary statutory language to effectuate a conveyance in 1991, 2) a confirmation deed cannot correct a void deed, and similarly, 3) a confirmation deed cannot affect property which is owned by third parties.

First, in order to have a conveyance under Utah Code Annotated section 57-1-12 or section 57-1-13, a deed must state that an interest is conveyed and warranted (section 57-1-12) or that an interest is quitclaimed (section 57-1-13). The Corrective Warranty Deed does not so state. Rather, the operative language is as follows:

> THEREFORE, to correct such mistakes, the parties to this Deed hereby ***amend*** the legal description on the [1982] Warranty Deed to the legal descriptions set forth on Exhibit "A" attached hereto.

"E"; R.278-79 (emphasis added). The exhibit then sets forth this language:

> The Grantee is granted the right over the existing access ways for convenient ingress and egress to Grantee's adjoining property as the same exists or as the same may subsequently be modified, provided, however, access will always be convenient and Grantor or its successors and assigns shall not prevent Grantee or his successors and assigns from convenient access to the adjoining property described above.

"E"; R.282. Notwithstanding the use of the word "granted" in the exhibit, it is clear from the sixth recital in the *deed* that the parties did not intend to create a new grant. This recital states:

> WHEREAS, the parties hereto intend that the corrections shall relate back to the date of the prior conveyance by the [1982] "Warranty Deed", so that the estate of William J. Lowenberg, grantee, will be as intended by the parties. ***The parties do not intend and do not hereby create any new limitation periods on actions or extend the same by virtue of this Deed.***

"E"; R.278 (emphasis added). This unambiguous language in the deed makes clear that the parties did not intend to create a new easement in 1991.

Second, correction or confirmation deeds are only effective if the original conveyance is not void.

> [T]he purpose of a correction deed is to admit mutual error and change the original instrument to conform to the true intent of the parties. On

> the other hand, ***a deed which does not of itself purport to convey the land will not operate to confirm the estate of a grantee who has no estate or whose deed is void.***

23 Am. Jur. 2d Deeds § 15 (1983) (emphasis added); 26A C.J.S. Deeds, § 42 (20001) (conveyance must contain operative language) (full text, Add. Ex. 3). This is of course the precise circumstance presented by the facts of this case. The Corrective Warranty Deed does not itself purport to convey an easement; it merely seeks to amend a legal description in the 1982 Warranty Deed. In addition, as to the conveyance of an easement, the 1982 Warranty Deed was void for want of a grantor. This is because Plan-Tech Corp. did not convey an easement to Minson-Halander ("A"). Therefore, Minson-Halander had no easement to convey to Western Management ("B" and "C"). Likewise, Western Management had no easement to convey to Lowenberg in 1982.

Finally, corrective or confirmation deeds have no application where the grantor has conveyed the property and the rights of third parties have intervened.

> [T]here can be no valid correction or confirmation of a void deed, and this is especially true when rights in the land have accrued to third parties prior to execution of the confirming deed.

23 Am. Jur. 2d Deeds § 333 (1983) (citing Blevins v. Mfrs. Record Publ'g Co., 105 So. 2d 392 (La. 1957). Likewise,

> Except where the grantor has divested himself or herself of title, a deed may be corrected by a subsequent instrument in the absence of fraud, or the intervention of the rights of third persons . . . .

26A C.J.S. Deeds § 43 (2001) (full text, Add. Ex. 3). See also Regan v. Boston Gas Light Co., 1884 WL 10534 (Mass.) (where the grantors previously parted with title, they cannot impose additional servitudes by a correction deed). At the time Western Management

executed the 1991 Warranty Deed, it had already conveyed away any interest it had in the Arnold property. This occurred seven years earlier in 1984. "O". As a result, Western Management had no interest in the Arnold property on January 22, 1991, and the Corrective Warranty Deed is ineffective.

X. ARNOLD WAS NOT ON NOTICE OF LOVES' CLAIM OF EASEMENT BECAUSE OF DEFECTS IN THE 1982 WARRANTY DEED AND ERRORS IN THE ABSTRACTING AND INDEXING OF THE 1991 CORRECTIVE WARRANTY DEED.

Prior discussions of constructive notice have dealt with the lack of notice imparted from the *contents* of deeds in the record. Specifically, those arguments dealt with the absence of any record easement which could be conveyed by Western Management, the defective description in the 1982 deed, and the fact that the grantors of the Corrective Warranty Deed had no interest of record. Those issues concern notice imparted from the contents of the documents themselves. This section deals with two related issues: inquiry notice and constructive notice from the statutory indices and abstracts.

A. Loves' "Claim" Of Easement vs. An Actual Easement—Notice Inquiry.

As demonstrated above, pp. 8, 13, although the 1982 Warranty Deed was indexed and abstracted to the Arnold property, the legal description of the purported easement did not describe any portion of the Arnold property. For this reason, the deed did not give constructive notice of a claim of an easement by Loves over the Arnold property. This, however, raises an important point concerning notice inquiry.

> One kind of constructive notice is notice which results from a record or which is imputed by the recording statutes; and the other is notice which is presumed because of the fact that a person has knowledge of certain facts which should impart to him, or lead him to, knowledge of the ultimate fact.

First Am. Title Ins. Co. v. J.B. Ranch, Inc., 966 P.2d 834, 837 (Utah 1998). Even if Arnold and its predecessors had been on notice of the easement purportedly granted in the Warranty Deed, through either the record or through the use of the Arnold property, such notice would have only been notice of a *claim of an easement*, not an easement in fact. This is because no easement existed. Thus, if Arnold had inquired of Lowenberg in 1993 about an easement, and if Lowenberg had stated that he owned an easement, the 1982 Warranty Deed upon which Lowenberg would have based his asserted easement still failed as a matter of law to create an easement for the reasons noted above.

In addition, after inquiring of Lowenberg and being advised that Lowenberg claimed an easement, Arnold would have had no duty to look beyond the deeds of record. Diversified Equities, Inc. v. Am. Sav. & Loan Ass'n, 739 P.2d 1133, 1137 n.5 (Utah Ct. App. 1987) ("[A] duty to inquire is not a duty to disbelieve, aggressively investigate, and set straight."). The law places no duty on Arnold to correct the flaws in Loves' claim of easement. Indeed, such acts would be inconsistent with Arnold's interests. Further, if Arnold had inquired and Lowenberg asserted an easement, it is clear that inquiry would have lead the parties to exactly the same position in which they find themselves today. That is, Loves' predecessor, Lowenberg, asserting a claim of an easement and Arnold asserting the absence thereof.

The same is true with regard to the Corrective Warranty Deed. Even if the Court declines to adopt the analysis immediately below and determines that the Corrective

Warranty Deed gave constructive notice, it would only have been notice of Loves' claim of an easement based upon invalid deeds, not of an easement in fact.

B. From Whence Does Constructive Notice Arise?

With regard to the Corrective Warranty Deed, the precise question presented herein is: From whence does constructive notice arise? See Boyer v. Pahvant Mercantile & Inv. Co., 287 P. 188 (Utah 1930) ("It may become necessary at some future time, and in a proper case, for this court to decide whether a mere filing of an instrument for record with the recording officer is sufficient to impart constructive notice.") (full text, Add. Ex. 3). Arnold believes that, consistent with due process considerations, notice arises from the abstracts and the indices provided for in the recorder's statute—in this case, Utah Code Annotated section 17-21-6 (2), (3), and (6) (1998) (full text, Add. Ex. 4). Utah's race-notice statute, enacted at the time relevant to this appeal (Utah Code Ann. § 57-3-2 (1994)) (full text, Add. Ex. 4), states that notice was imparted upon "filing" of a document with the appropriate county recorder. However, neither the race-notice statute nor the recorder's statute define either "filing" or "recording." Boyer v. Pahvant Mercantile & Inv. Co., 287 P. at 190-91 (nothing in section 57-3-2 or section 57-3-3 specifically defines what is meant by the word "recorded"). The recorder's statute does, however, authorize various means of recording such as typewriter, camera, microfilm, etc. Utah Code Ann. § 17-21-3 (1998) (full text, Add. Ex. 4).

C. Because The Corrective Warranty Deed Was Not "Properly Recorded," It Did Not Impart Constructive Notice.

Arnold's position is that notice is imparted when an instrument is properly recorded. This position is supported by a North Dakota Supreme Court decision:

> In our state, today, the tract index is the only practical index through which instruments on record can be located. It would be a prohibitive burden to locate instruments on record without a tract index. It would certainly be a travesty of justice to hold that prospective purchasers are bound by the record, ***if for all practical purposes the record cannot be located.***

Hanson v. Zoller, 187 N.W.2d 47, 56 (N.D. 1971) (emphasis added) (full text, Add. Ex. 3). This reasoning is particularly appropriate in this case. When Arnold completed its title search, the search did not reveal the Corrective Warranty Deed for two reasons. First, the posting for the Corrective Warranty Deed does not have an abstract (an abbreviation) of the legal description of the Arnold property. The abstracts in the tract index allow a document to be located geographically, based upon the abbreviation of the legal description of the property to which the document pertains. Utah Code Ann. § 17-21-6(6) (1998) (the tract index "shall be so kept as to show a true chain of title to each tract or parcel and the encumbrances thereon . . . .") (full text, Add. Ex. 4). Here, there is no notice because the posting in the tract index does not have an abstract of the legal description of the Arnold property. R.637, see XI below. In the absence of such an abstract, because the Corrective Warranty Deed was the 5,015,202nd document to be recorded since 1888, R.1077-78, it would be a nearly impossible task for a title searcher to discover the deed.

Second, the grantor and grantee indices show William J. Lowenberg as both grantor and grantee. R.637, 639, 644. The grantors' and grantees' indices allow a title search

alphabetically by the name of the grantor or grantee. Utah Code Ann. § 17-21-6(2), (3) (1998) (full text, Add. Ex. 4). But since Lowenberg never owned an interest in the Arnold property (Exhibit 7 and deeds referenced therein), any deed to the Arnold property executed by Lowenberg would be a "wild" deed, void for want of a grantor, and of no consequence to a searcher of title to the Arnold property.

In the absence of an accurate abstract in the tract index and accurate grantors' and grantees' indices, there is no "proper recording." Without a proper recording, the only means of discovering all documents which purport to affect a property is an instrument-by-instrument examination, based upon the entry record of every document in the Recorder's office. An examination of all 5,015,202 documents, R.1077-79, listed sequentially in the entry record (Utah Code Ann. § 17-21-6(1) (1998)) of the Recorder's office would be a prohibitive burden, as referenced by the North Dakota court. Such a burden is clearly unreasonable and inconsistent with basic notions of due process, particularly when *accurate* tract, grantor, and grantee indices provide ready accessibility to the record.

D. Arnold's Position Is Consistent With Recent Amendments To The Race-Notice And Recorder's Statutes.

In 1998, the race-notice statute was amended to provide that a document imparts notice of its contents "from the time of recording" as opposed to from the time "of filing" under the prior statute. Utah Code Ann. § 57-3-102 (1998) (full text, Add. Ex. 4). In 1999, the recorder's statute was rewritten and reorganized. The new recorder's statute has deleted the authorized methods of recording previously set forth in section 17-21-3 (1998) (full text, Add. Ex. 4), and now contemplates "recording procedures." Utah Code Ann. § 17-21-3

(1999) (full text, Add. Ex. 4). Arnold believes that these amendments are consistent with the basic concept expressed in Hanson v. Zoller as well as reported Utah cases. See U.P.C., Inc. v. R.O.A. Gen., Inc., 990 P.2d 945, 953 (Utah Ct. App. 1999) ("[C]onstructive notice is imparted when documents are properly recorded.") (citing Utah Code Ann. § 57-3-2(3)); Johnson v. Higley, 989 P.2d 61 (Utah Ct. App. 1999) ("[T]he recording statute provides that constructive notice is imparted when documents are properly recorded.").

Consistent with the new amendments, Arnold's position is that a document is "properly recorded" when "recording procedures," including abstracting and indexing, are correctly completed. A document which has been so "recorded" imparts notice of its contents.

XI. THE TRIAL COURT ERRED IN RULING THAT THE ABSTRACT OF THE CORRECTIVE WARRANTY DEED IMPARTED NOTICE OF THE EASEMENT.

The abstracts and indices are not documents themselves, but rather are vehicles that allow a searcher to discover properly recorded deeds and other instruments which purport to affect a given property. The trial court found that the Recorder's posting of incomplete information from the 1991 Corrective Warranty Deed to the abstracts and indices was sufficient to give notice of Loves' claim of easement. R.995. The court held that this was because, at the end of the abstract of the *Loves'* property description, in the posting for the Corrective Warranty Deed, that abstract recited, "SEE DOCUMENT FOR ADDITIONAL DESCRIPTION." R.995.

The *complete* language of the relevant portions of the abstract and the language following the abstract is set forth below. A complete copy is found at R.637. It is important

to understand that the abbreviated legal description immediately above the bolded lines is the abstract of the legal description of the *Loves'* property. R.284, 637. This *is not* an abstract of the legal description of the Arnold property. R.315. The trial court took these five words out of context and mistakenly concluded that they would lead a title examiner to the Corrective Warranty Deed. In fact, when taken in context this language does just the opposite.

* * * SALT LAKE COUNTY ABSTRACTS * * *
SEC 21 TWNSHP 1S, RNG 1W

* * *

BEG N 0°02'35" E 1083 FT & W 2556.812 FT FR CEN SEC 22, T 1S, R 1W, SLM; N 846.434 FT; SW'LY ALG CURVE T0 L 69.833 FT; S 58° 19'02" W 227.853 FT; S 16°02'36" E 522.935 FT; S 73° 57'24" W 82 FT; S 16°02'36" E 67 FT; S 104 FT; E 170 FT TO BEG 3.304 AC 5337-1149, 5316-554, 4983-88, 6284-1366
ALSO POSTED SEC 22 1S 1W
SEE DOCUMENT FOR ADDITIONAL DESCRIPTION
SUBJ TO TR D BK 5009 PG 1061; SUBJ TO EASE RESTR ETC

R.637, (bold added) (full text, Add. Ex. 1, item 3)

This language, "ALSO POSTED SEC 22 1S 1W—SEE DOCUMENT FOR ADDITIONAL DESCRIPTION," is not sufficient to give notice that the Corrective Warranty Deed affects the Arnold property. Nor does it give notice that there is additional land affected by the Corrective Warranty Deed in *Section 21*, in which the Arnold property is located. It *is notice* that there is additional land in Section 22 that is affected by the Corrective Warranty Deed. But, no part of the Arnold property is located in Section 22. Add. Ex. 1, item 2; R.527. All of the Arnold property is located in Section 21. R.527. Accordingly, neither the limited portion of the language relied upon by the court, nor the

bolded language in its entirety, was notice to Arnold of the Corrective Warranty Deed. It is clear that this language was only intended to be notice that the Corrective Warranty Deed *also* affected that portion of the *Loves'* property that is *also* located in Section 22. Further, the posting for the Corrective Warranty Deed indicated, by tax parcel number (15-21-226-006-0000), that the Corrective Warranty Deed only pertained to the Loves' property. R.526, 1074-76.

Indeed, the bolded language and the other information in the posting directs the attention of a title examiner of the Arnold property *away* from further inquiry as to whether the Corrective Warranty Deed affects the Arnold property or any other property in Section 21. This is because, at the end of the abstract of the *Loves'* property, it clearly implies there is no other affected property in Section 21 and that, if the examiner is concerned with property located in Section 22, he/she should examine the document for an additional description.

In arguing that these five words—SEE DOCUMENT FOR ADDITIONAL DESCRIPTION—were sufficient to give notice, the Loves relied upon Boyer v. Pahvant Mercantile & Inv. Co., 287 P. 188 (Utah 1930) (full text, Add. Ex. 3). However, Pahvant is readily distinguished from this case because in Pahvant, the instrument in question was not abstracted, but

> the instrument was . . . correctly noted in the grantor's, grantee's, mortgagor's, and mortgagee's indices.

Id. at 190. Here, the 1991 Corrective Warranty Deed was not correctly noted in the tract, nor the grantees', nor the grantors' indices. William J. Lowenberg was indexed as both

grantor and grantee. Lowenberg never owned an interest in the Arnold property. Thus, any conveyance by Lowenberg would not affect the Arnold property and would be of no concern to an examiner of title to the Arnold property.

Accordingly, the language in question is not "sufficient" to be notice.

XII. THE QUIET TITLE DECREE IS IRRELEVANT TO THE LOVES' CLAIM OF EASEMENT.

The court also incorrectly concluded that the 1991 Quiet Title Decree established an easement. R.995. In interpreting court decrees, a familiar rule of construction is applied. If the language within a judgment is clear and unambiguous, it must be enforced as it speaks. Park City Utah Corp. v. Ensign Co., 586 P.2d 446 (Utah 1978). In addition, neither pleadings, findings of fact, nor matters outside the record may be used to change its meaning or to construe it. 46 Am. Jur. 2d Judgments § 97 (1994). More to the point in this case:

> It is only the decretal portion of the judgment that is operative as a judgment; the rights of the parties are adjudicated, not by the recital of facts, but solely by the decretal portion.

Id. § 99. Here, the decree is clear. According to its own unambiguous terms, the decree only adjudged and decreed that the buildings on the Love property did not violate any setback requirements of the restrictive covenants of the commercial subdivision. Arnold's position before the trial court is clearly supported by the language of the decree that, in pertinent part, states as follows:

> IT IS HEREBY ORDERED, ADJUDGED AND DECREED that certain real property owned by Plaintiff William J. Lowenberg with common address of 2215 West 2300 South, Salt Lake City, Utah (described in Exhibit "A" hereto) and the buildings situated thereon and all site improvements thereon, do not

> violate any side yard requirements and otherwise fully comply with the "Redwood Park Restrictive Covenants". . . and any and all adverse claims respecting the application of the Redwood Park Restrictive Covenants to the fully improved buildings and other site improvements upon Plaintiff's real property are now and forever quieted and extinguished in favor of Plaintiff and his successors.

R.630-31. The operative language adjudges and decrees that there are no set back requirements that have been violated. The decree has nothing to do with an easement in favor of the Loves and is therefore irrelevant to such matters. The court's conclusion is therefore in error.

XIII. TO THE EXTENT THAT THE TRIAL COURT RELIED UPON THE SUPPLEMENTAL AFFIDAVIT IN RENDERING SUMMARY JUDGMENT, THE COURT ABUSED ITS DISCRETION IN FAILING TO STRIKE THE SAME.

After the trial court granted Loves' motion for summary judgment, Arnold filed an objection to the court's ruling. In relevant part, Arnold noted that Loves' motion, and hence the trial court's ruling, was based completely on deeds of record. R.970. Arnold also pointed out that Loves had not offered any affidavit or other evidence to prove their assertion that the Arnold property was intended to be partnership property on January 22, 1991, the date of the Corrective Warranty Deed. R.976. The court entered an order proposed by Loves' counsel over Arnold's objection. R.991.

After the order was entered, Loves submitted the Supplemental Affidavit of Ronald W. Smith, one of the partners of Western Management. In material part, this affidavit stated that the Arnold property was partnership property on January 22, 1991. R.1001. Arnold then submitted discovery to determine whether tax records, corporate books, and other business records supported the assertions in Smith's belated affidavit. R.1038-58. Mr. Smith and the other Third Party

Defendants refused to provide any meaningful information in response to the discovery. Third Party Defendants even refused to produce documents that were admittedly available. R.1048. The little information provided actually supported the view that the individuals, not the partnership, owned the Arnold property on January 22, 1991. R.1372 ¶¶ 6, 8. Thereafter, Arnold moved to strike the supplemental affidavit or, in the alternative, to compel discovery. R.1275. The court denied Arnold's motion. R.1368. The court denied a motion to reconsider. R.1389.

Noting that the supplemental affidavit was filed after the court had signed and entered the order on the cross-motions for summary judgment, R.991, 1001, Arnold believes that it is exceedingly improbable that the court relied upon the affidavit. This point is raised merely to confirm that the supplemental affidavit is not part of the record below. To the extent that the trial court may have relied upon the affidavit, it was error for the court not to strike.

XIV. THE TRIAL COURT ERRED IN GRANTING SALT LAKE COUNTY'S MOTION TO DISMISS.

The last question deals with Arnold's claim of negligence against the County. This claim was brought in the alternative. Arnold alleged that should it be bound, and therefore damaged, by Loves' claim of easement, it was entitled to recover those damages from the County for the County's failure to properly abstract and index the Corrective Warranty Deed. R.789-91.

The facts are clear that the County's negligence occurred in January or February 1991, shortly after the execution of the Corrective Warranty Deed. R.1073, 1078, 1191. It is also clear that Arnold had no notice of the County's negligence two and one-half years later when it purchased the property, R.1073-74, or five years later, when Loves made their

first claim of easement across the Arnold property on April 12, 1996. R.1073-74. Thereafter, Arnold tendered the defense of Loves' claim of easement to its title insurer. R.1073. Arnold's counsel completed an initial evaluation of Loves' claim on May 23, 1996. R.1073. Loves tendered the defense of their claim of easement to their title insurer about the same time. R.1076. Loves' insurance counsel became involved on June 19, 1996. R.1076-77.

Subsequently, detailed and extensive settlement negotiations ensued. R.1199-1245. These discussions included detailed legal analyses of the parties' respective legal positions as well as highly specific settlement proposals involving on-site engineering, engineered drawings, and plat maps. R.1236-38. Further, it is important to understand that these negotiations involved bilateral settlement discussions on each side. That is, in order for this matter to settle, Arnold would have to reach a settlement agreement with both its insurer and the Loves; and similarly, Loves would have to reach a settlement agreement with their insurer and Arnold. Ultimately, such a settlement was not possible, and litigation commenced in earnest in July 1997. R.1077. On July 2, 1997, Arnold first discovered that the County had failed to properly abstract and index the Corrective Warranty Deed. R.1077. Arnold's discovery came as a consequence of an examination of the RXAU record of the Recorder's office. R.398-99, 1190. The RXAU record is not an official record authorized by statute. Utah Code Ann. § 17-21-6(1)-(12) (1998) (full text, Add. Ex. 4). Rather, it is "the data entry screen" through which the Recorder "entered the information from the [Corrective Warranty Deed]." Add. Ex. 1, item 5; R.1074. Arnold gave the County notice of its claim pursuant to the Governmental Immunity Act on August 4, 1997. R.948.

These matters were presented to the trial court on the County's motion to dismiss. R.935. The court granted the County's motion, stating in pertinent part:

> The Court finds plaintiff's arguments unpersuasive. On April 12, 1996 defendants claimed an easement over plaintiff's property. Upon learning of this claim, plaintiff's counsel evaluated the claim and the corrective warranty deed as reflected in a May 23, 1996 correspondence between counsel. The combination of the two events, indicates to this Court that at that time plaintiff had reasonable grounds to question the existence of an easement and either should have, or did, investigate the matter further.
>
> Accordingly, as a matter of law, the plaintiff has not shown that it did not know or could not have reasonably known about the cause of action against defendant within the statutory period.

Add. Ex. 5, item 2; R.1312.

A. The Court Erred In Penalizing Arnold For Settlement Efforts.

In ruling that Arnold's claim was time-barred, the trial court failed to recognize and implement our state's policy that promotes settlement of disputes. Alvin G. Rhodes Pump Sales v. Indus. Comm'n of Utah, 681 P.2d 1244 (Utah 1984); Tracy-Collins Bank & Trust Co. v. Travelstead, 592 P.2d 605 (Utah 1979); Reynolds v. Merrill, 460 P.2d 323 (Utah 1969). In order to give substance and meaning to this policy, the trial court should have recognized that such detailed and extensive settlement negotiations take time and resources, to the exclusion of other efforts. Devoting time and resources to settlement, as in this case, necessarily deprives a party of the opportunity to do discovery or investigate matters which are not directly related to the settlement, or which are not obvious or apparent. By failing to recognize that Arnold's efforts in settlement excluded other efforts that might have lead to discovery of the County's negligence, the court effectively penalized Arnold for these endeavors.

B. Arnold Had No Reason To Suspect The County's Negligence.

The trial court's error is further clarified by the fact that not only did Arnold have no notice of the County's negligence, but neither did it have reason to suspect negligence on the part of the County. The County had an affirmative duty to disclose the existence of the Corrective Warranty Deed. Utah Code Ann. § 17-21-1, et seq. The County's negligent performance of this duty had two distinct consequences. First, it concealed the existence of the Corrective Warranty Deed until 1996, when Loves first made their claim. Second, this negligent omission, by its very nature, was itself hidden. In reasonably relying upon the accuracy of the County's official records, which title examiners presume to be accurate, R.1192, Arnold had no reason to suspect the County's negligence. Arnold only discovered the negligence upon inspection of the unofficial RXAU record. Add. Ex. 1, item 5; R.396-99, 1074-76, 1190 ¶¶ 3-5; Utah Code Ann. § 17-21-6(1)-(12) (1998) (full text, Add. Ex. 4). Hence, Arnold argued that the statute of limitations must be tolled until July 2, 1997, under the discovery rule. "Under the discovery rule, 'the [statute of] limitations . . . does not begin to run until the discovery of facts forming the basis for the cause of action.'" O'Neal v. Div. of Family Serv., 821 P.2d 1139, 1143 (Utah 1991) (quoting Myers v. McDonald, 635 P.2d 84, 86 (Utah 1981)).

C. Arnold Gave Notice To The County Within One Year Of When It Should Have Discovered The County's Negligence.

In the alternative, Arnold argued that the limitations period on its claim against the County did not begin to run until some reasonable time after the Loves first asserted the easement on April 12, 1996. "[T]he . . . limitations period 'does not commence to run until

the injured person knew or *should have known* that he had sustained an injury and that the injury was caused by negligent action.'" Seale v. Gowans, 923 P.2d 1361, 1363 (Utah 1996) (quoting Foil v. Ballinger, 601 P.2d 144, 148 (Utah 1979)). In this case, the time necessary to discover the County's negligence included sufficient time for Arnold to negotiate settlement, search the Arnold and Loves' chains of title, and to expose an omission which, due to the very nature of omissions, was not present on the public record.

Taken in combination, Utah Code Annotated section 63-30-13 and the discovery rule provide that a notice of claim must be made within one year of when the facts giving rise to the claim should have been discovered. Arnold gave notice of its claim on August 4, 1997. Arnold's claim would be time barred only if Arnold *should have discovered* the County's negligence more than one year earlier, or before August 4, 1996. Therefore, the trial court placed Arnold under a duty to discover the County's negligence before August 4, 1996. There are only 114 days between the date Loves made their claim of easement on April 12, 1996, and August 4, 1996. By granting the motion to dismiss, the trial court effectively ruled that it was unreasonable for Arnold to take 114 days to: 1) receive the Loves' claim of easement, 2) present the defense of the claim to its insurer, 3) investigate and evaluate the Loves' claim, 4) become aware of the fact that the Arnold property was not described in the abstract of the Corrective Warranty Deed, 5) conduct a detailed examination of the County's computer files, thus discovering that the County had failed to correctly abstract the Corrective Warranty Deed—all the while engaging in legitimate settlement efforts to resolve the original claim by the Loves.

D. Case Law Supports Arnold's Position.

This case is much like Klinger v. Kightly, 791 P.2d 868 (Utah 1990) (full text, Add. Ex. 3), and Sevy v. Security Title Co. of Southern Utah, 902 P.2d 629 (Utah 1995) (full text, Add. Ex. 3), because the County's mistake was concealed, technical, and esoteric and because Arnold had no reason to doubt the accuracy of the County's records. In Sevy, the Court noted that because "surveying requires technical knowledge and yields intangible results, the buyers had 'no reason to suspect that the survey was inaccurate.'" Id. at 636 (quoting Klinger, 791 P.2d at 872). Like the surveying in Klinger, and the perfecting of a security interest in water stock in Sevy, the abstracting of the 1991 Corrective Warranty Deed by the County "require[d] technical knowledge not possessed by people in general, and the nature of this task is such that a negligent failure to perform it properly *may not be discovered until years later*." Sevy, 902 P.2d at 636 (emphasis added). In Foil v. Ballinger, 601 P.2d 144 (Utah 1979), this Court adopted the following reasoning of the Oregon Supreme Court:

> To say that a cause of action accrues to a person when she may maintain an action thereon and, at the same time, that it accrues before she has or can reasonably be expected to have knowledge of any wrong inflicted upon her is patently inconsistent and unrealistic. She cannot maintain an action before she knows she has one. To say to one who has been wronged, "You had a remedy, but before the wrong was ascertainable to you, the law stripped you of your remedy," makes a mockery of the law.

601 P.2d at 148-49 (quoting Berry v. Branner, 421 P.2d 996, 998 (Or. 1966)).

Consistently, the facts of this case present an appropriate circumstance to apply the discovery rule.

CONCLUSION

Based upon the undisputed facts and the proper application of law to those facts, Arnold requests that this Court reverse the trial court, and direct that summary judgment be entered in favor of Arnold, adjudging and decreeing that no easement exists across the Arnold property. Such a ruling would of course moot Arnold's claims against the County. In the alternative, should the Court find that Loves' claim of easement is binding upon Arnold, Arnold requests the trial court's order on the motion to dismiss be reversed so as to allow further proceedings against the County.

Respectfully submitted on this 25 day of June, 2001.

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